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CENTRE FOR COMPETITION POLICY

CCP Response on Updating Hong Kong's Copyright Policy

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Please consider this response as public and citable.[1]

This submission draws on the comparative research conducted by Dr Sabine Jacques over the last ten years on copyright exceptions which resulted in a book publication with Oxford University Press (The Parody Exception in Copyright Law, 2019) and a series of peer-reviewed academic papers. The evidence presented focuses on the two parts of the call (exhaustive approach to exceptions and contractual override).

[1] Suggested reference: Jacques, S., (2022) "CCP Response to Consultation on Updating Hong Kong's Copyright Regime". Centre for Competition Policy Consultation Response, 23 February.

Brief summary:

This submission offers evidence in response to the following questions posed in the call on updating Hong Kong's copyright regime:

1) Exhaustive approach to exceptions (Chapter 3)

1.2) Against the above analysis, we would like to invite views on the following issue: Hong Kong, similar to most jurisdictions worldwide, should continue to maintain the current exhaustive approach by setting out all copyright exceptions based on specific purposes or circumstances in the CO.

2) Contract override (chapter 4)

2.1) Hong Kong should not introduce provisions to the CO to restrict the use of contracts to exclude or limit the application of statutory copyright exception(s).

The evidence draws from:

- A review of historical developments in copyright;
- A review of recent cases and most relevant literature;
- Empirical research into the impact of automatic anti-piracy systems on cultural diversity.

We find that:

- Changing from an exhaustive to a non-exhaustive system jeopardises legal certainty, could lead to a violation of international copyright law and does not automatically lead to a more flexible system. Evidence suggests that although a non-exhaustive system has the potential to be more flexible, courts tend to be more conservative in their application. Therefore, changing the system of copyright exception does not necessarily mean a better alignment with users' expectations or a better promotion of freedom of expression;
- Assuming a lack of empirical evidence supporting the position that freedom of contract has a detrimental impact on the efficiency of copyright exceptions, there are strong arguments in favour of making some copyright exceptions which are deeply anchored in human rights. This is more in line with the human rights framework and offsets the lack of flexibility of copyright exceptions to some extent.

Introduction

With the development of copyright law towards further protection for right-holders, there is an increasing demand for scrutinising the balance struck between the rights of right-holders and the interests of others. After all, copyright aims to foster the creation of creative works later disseminated in society. If right-holders' rights are not adequately calibrated, this may dramatically impact the future of creative endeavours and circulation of cultural works in society. It may also impede on the protection and promotion of the right to freedom of expression.

Against this backdrop, Hong Kong's initiative to update its copyright regime must be praised. It demonstrates a willingness to ensure that its copyright regime is fit for purpose as well as increasing its legitimacy in the public's eye. We thank the Government for enabling us to share our views.

Chapter 3: On the exhaustive approach to exceptions

Maintaining an exhaustive approach to copyright exceptions is the best way to respect international obligations. The satisfaction of international obligations would be jeopardised by the adoption of a non-exhaustive approach. To preserve the right of reproduction and harmonise copyright exceptions at international level, copyright exceptions not specifically protected under Berne and TRIPS (such as quotations or illustrations for teaching – article 10 Berne Convention and via article 9 TRIPS) must meet the three-step test (article 9.2 Berne Convention). This 'tool' requires legislators wishing to introduce copyright exceptions to ensure that these meet three distinct and cumulative requirements.[2] Consequently, copyright exceptions must remain confined to 'certain special cases' which must not 'conflict with the normal exploitation of the work' and precluding any 'unreasonable prejudice to the legitimate interests of the author/right-holder'. In essence, the three-step test was introduced as a protective shield to mitigate concerns over the introduction of new and unconstrained exceptions to the reproduction right.[3]

Adopting an open-ended approach to copyright exceptions, such as fair use, may represent a challenge in the compliance with the international three-step test. In fact, legal scholars today are still debating whether fair use is compliant with the three-step test.[4] This point was part of a complaint lodged by the European Community against section 110(5) of the US copyright Code in 1999 to the WTO Dispute Settlement Body.[5] The facts can be summarised as follows. Section 110(5) of the US Copyright Code enables television and radio to be played in public spaces without the payment of a royalty fee under certain conditions. As a starting point, the WTO Dispute Settlement Body confirmed that the first requirement of exceptions being limited to 'certain special cases' means that the situations to which the copyright exception applies must be well-defined and narrow in scope.[6] Consequently, there are serious concerns that a shift from a closed to an open approach to copyright exceptions would challenge the satisfaction of this first requirement.[7] Additionally, as the defence can be available to anyone for any purpose, the group of users can potentially be unlimited, inherently adding uncertainty as to the satisfaction of this first three-step test requirement.[8] This represents the

[2] For a complete study on the interpretation of the three-step test, see M. Senftleben, *Copyright, Limitations and the Three-Step Test: An analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer, 2004).
[3] S. Jacques, *The Parody Exception in Copyright Law* (OUP, 2019), 54.
[4] Ibid, 65.
[5] WTO Panel WT/DS160/5 of 16 April 1999. The WTO Panel examined the compliance of fair use as enshrined in section 110(5) of the US Code with the three-step test of article 13 TRIPs Agreement 1994.
[6] WTO Panel WT/DS160/5 of 16 April 1999, at 6.113.
[7] H. C. Jehoram, 'Restrictions on copyright and their abuse' (2005) 27(10) *EIPR* 359, 362.
[8] S. Jacques, *The Parody Exception in Copyright Law* (OUP, 2019), 66.

traditional objection to whether the fair use doctrine can be qualified as 'limited' in reach and scope as warranted by the three-step test.

This being said, some jurisdictions have contemplated moving away from an exhaustive approach to copyright exceptions and limitations towards a fair use doctrine to counterbalance the developments in copyright legislation which have sought to reinforce the rights of right-holders at the expense of the interest of users and the wider public. Given the pace of technology and the changing habits of users, adopting a fair use doctrine gains popularity due to its flexibility. Nevertheless, there are three difficulties in doing so.

Firstly, whilst the US fair use doctrine was eventually held as compliant with the three-step test as enshrined in TRIPS, this result mainly hinged on the fact that the doctrine rests on a rich jurisprudence developed over the last 150 years enabling the determination of which 'certain special cases' the exception pertains to.[9] Whether a jurisdiction can swiftly go from one approach to another without the teaching from a rich jurisprudence to funnel the legitimate uses from uses which would impact the normal exploitation of works by right-holders is uncertain.[10]

Secondly, despite its appealing flexibility, fair use is not always easily applied by courts. This is evidenced by parodic uses in the US. Although the Supreme Court in *Campbell*[11] did not exclude parody uses using copied copyright materials as a vehicle for comments, the net result is that lower courts interpreted the Supreme court's narrowing of the defence to uses commenting upon the work borrowed. The facts of the case at hand were interpreted as *excluding* any parodies using a copyright-protected work as a vehicle for commenting on another subject because these uses could rely on other materials to pass the comment intended. For many years, there have therefore been discussions as to whether satires - which are equally strongly supported by freedom of expression arguments - can in fact be protected.[12] Whilst this matter is more or less resolved by allocating greater weight to the transformative nature of the use, satires were eventually saved from constituting an infringement based on the robust US First amendment culture.[13] In essence, the adoption of fair use leads to more legal uncertainty as to the outcome of particular cases given the absence of purposes for which the doctrine is applicable and the absence of guidance as to the appreciation of fair use factors in a jurisdiction whose legal history is based on an exhaustive list of exceptions.

Thirdly, operating such a shift in conceiving exceptions implies a more in-depth revamp of copyright principles. For example, copyright laws around the world tend to abide by the principle of high level of protection for right-holders and strict interpretation of exceptions. Moving away from an exhaustive list of exceptions could offset the careful balance struck by legislators. In this regard, undertaking a comparative exercise with the UK may be beneficial given the shared legal history between both jurisdictions.

This being said, although some may argue that maintaining an exhaustive list of exceptions is less flexible and less easily adapts to the technological changes, it must be emphasised that the adoption of fair use could lead to judicial difficulties. In fact, both approaches represent challenges. Whilst an open-ended approach may give the flexibility to adapt to new technological uses without legislative

[9] S. Jacques, *The Parody Exception in Copyright Law* (OUP, 2019), 25.
[10] Ibid.
[11] *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
[12] It is therefore valuable for the Government to expressly include satires amongst the purposes of the new parody exception.
[13] Sabine Jacques, *The Parody Exception in Copyright Law* (OUP, 2019), 164; J. Mo, 'Media shifting in Hong Kong - a justifiable exemption?' (2009) 20(6) *Ent. L. R.* 222, 225.

intervention, this can only occur where the judiciary is familiar with this type of flexible legal notion as well as having a robust framework protecting freedom of expression. Simply implementing the fair use doctrine from a different judicial system will not yield the similar results. There are nevertheless ways to render fair dealing more flexible. Although the purposes are set in the legislation, factors are not. The judiciary can choose which factors are more pertinent for the facts at hand as well as introducing additional fairness factors. The legislative purposes are not set in stone either. As a matter of interpretative principle, the ordinary meaning of terms should prevail.[14] This generally means that dictionary definitions constitute the starting point to any analysis. However, courts must remember that the application of the exception must enable the realisation of the objectives sought by the legislator. This provides some breathing space for the judicial system to stretch the boundaries of a copyright exception as long as stretching the scope of the definition does not go beyond or against the objectives underpinning an exception.[15] For example, exceptions deeply rooted in the right to freedom of expression such as the new exceptions of parody, quotation and comment on current events require courts to acknowledge that users have more than a simple interest to see these uses saved from infringement.[16] Deeply linked to the realisation of the fundamental right to freedom of expression, it is legitimate to recognise that these exceptions act as rights in the sense that as soon as the requirements attached to the realisation of one of these exceptions are met, the exclusive rights of the right-holders must make way in favour of the user relying on the exception. Essentially, exceptions should not be interpreted in a restrictive manner.

Chapter 4: Contract override

The new fair dealing exceptions proposed by the Government demonstrate the increased commitment to protecting freedom of expression. These steps ought to be applauded. However, these efforts would be moot without proper safeguards and there is no denying that the digital environment has made it easier for right-holders to fortify their position to safeguard their rights at the expense of legitimate uses by users through imposed contractual terms on users.[17]

Therefore, as much as the principle of freedom to contract must be preserved, there is a legitimate question to ask which is how freely parties are able to contract online. As skilfully explained by Guibault, in the traditional contract theory, parties have equal bargaining powers and can negotiate contractual terms in good faith.[18] Consequently, if a party decides to waive the application of a copyright exception, this is based on an understanding of the implications of doing so. However, this traditional setting has largely been superseded by the standard terms of contract model whereby parties do not have equal bargaining powers. Indeed, often a party will set the 'standard terms' and is unwilling to deviate from these. Whilst standard contractual terms exist in the analogue world, the digital online environment has dramatically increased their use. Guibault concludes that there is a serious risk that such contractual term prohibits an individual from exercising their right to freedom of expression and will lead to a disproportionate erosion of freedom of expression.[19] After all, if the

[14] Vienna Convention on the Law of Treaties 1969.

[15] S. Jacques, 'On the wax or wane? The influence of fundamental rights in shaping exceptions and limitations' in E. Rosati (eds) *The Routledge Handbook of EU Copyright Law* (Routledge, 2021) 281-298.

[16] S. Jacques, *The Parody Exception in Copyright Law* (OUP, 2019), 71.

[17] S. Jacques, *The Parody Exception in Copyright Law* (OUP, 2019), 86; C. Geiger, 'De la nature juridique des limites au droit d'auteur' (2004) 13 *Propriétés Intellectuelles* 882, 889; M. Buydens & S. Dussollier, 'Les exceptions au droit d'auteur: evolutions dangereuses' (2001) 22 *CCE* 10, 13.

[18] L. Guibault, *Copyright and contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer, 2002) 198.

[19] L. Guibault, *Copyright and contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer, 2002) 268.

reliance on or application of copyright exceptions can easily be circumvented through standard contractual terms, this would disrupt the intended internal balance sought by the legislator in copyright law.[20]

[20] Which is not unheard of in some industries such as the music industry, see S. Jacques, 'Are the new fair dealing exceptions an improvement on the previous UK law, and why?' (2015) 10(9) *JIPLP* 709. For empirical evidence on the wider implications of automated anti-piracy systems on cultural diversity, see S. Jacques, K. Garstka, M. Hviid & J. Street, 'An empirical study on the use of automated anti-piracy systems and the consequences for cultural diversity' (2018) 15(2) *SCRIPTed* 277.

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